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Army and Navy -- Selective Service -- When Is Induction Complete?

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A note by Robert R. Bond, a law student in the North Carolina College for Negroes, appears in this issue.

Footnotes which contain material other than a mere listing of sources and authorities are indicated throughout this REVIEW *by an asterisk placed after the footnote number.*

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NOTES AND COMMENTS

Army and Navy—Selective Service—When Is Induction Complete?

Habeas Corpus. Petitioner contended that he was unlawfully deprived of his liberty and held for army service. He stated that he was a conscientious objector and urged that claim before his local draft board. Being overruled, he appealed to the state board; and again being denied, he presented himself at the induction center to which he had been directed. There he was given a physical examination and notified of his acceptance for service in the army and was commanded to stand and take the oath of induction. He refused, and was ordered to the guard house, and this proceeding followed.

After an interesting discussion of the petitioner's social philosophy and background, the court agreed with the draft board that he was not a conscientious objector but a combination of Socrates[1] and Mohandas

[1] Like Socrates, he "thought the law was unjust, but . . . didn't feel the call to evade it."

Gandhi,[2] and "an over-educated, egotistical, scholastic slacker." He contended that he was not finally inducted and subject to military authority till he took the oath of induction. However, it was held that he became a soldier subject to military jurisdiction when he was accepted for service by the government, irrespective of his personal desires or mental attitude. Habeas corpus denied.[3]

At another point in the opinion, the court stated that *notice* of acceptance operated as induction. Thus it is not clear whether actual notice is necessary, but, from its discussion taken as a whole, it would seem that this court would not require notice. With this, the officials of the Army and the Selective Service appear to be in full accord. Maj. Charles R. Jonas, North Carolina State Director of Selective Service, has said that after the Selective Service delivers the draftee to the induction station "The question of induction . . . is one for the army to determine. . . . Billings [petitioner] probably could have been returned to his local board by the recruiting and induction officer, and he could have been prosecuted [by the civil authorities] for refusal to submit himself for induction [which is just what the petitioner contended for]. The recruiting and induction officer decided to proceed otherwise, and apparently his procedure has met with the approval of the court."[4]

If this be the law, it is different from the law under the Selective Draft Act of 1917[5] which required notice of physical qualification for service.[6*] One case under that act, however, tends to substantiate the principal case in holding that no oath was necessary to induction;[7] but this was based on an express statutory provision that all enlistees and draftees were subject to military law from the date that their notices of call required them to report,[8] and the notices themselves contained such a statement. This applied whether or not the notice was ever actually received.[9] If the address to which the notice was mailed was correct,[10] then the mailing constituted complete notice.[11]

[2] Like Gandhi, he said if the Germans and Japanese occupied our country, he would not resist, but he would not cooperate with the invaders.

[3] *Ex parte* Billings, 46 F. Supp. 663 (D. C. Kan. 1942).

[4] Letter to the author (January 15, 1943).

[5] 40 STAT. 76 (1917), *as amended*, 40 STAT. 534 (1918), 40 STAT. 885 (1918), 40 STAT. 995 (1918), 50 U. S. C. A. p. 165 (1927).

[6*] Ver Mehren v. Sirmyer, 36 F. (2d) 876 (C. C. A. 8th, 1929). It is important to note the difference between the induction process under the act of 1940 and the act of 1917. Under the present act the draftee is inducted at the hands of the army after he presents himself at the induction center. Under the 1917 act, induction was completed at the hands of the local board before the draftee reported for active duty. After induction the inductee was mailed his notice ordering him to report on a certain date and informing him that he would be subject to military jurisdiction as of that date. However, his induction could not be complete without notice of physical qualification.

[7] Franke v. Murray, 248 Fed. 865, L. R. A. 1918E 1015 (C. C. A. 8th, 1918).

[8] Second Article of War, 41 STAT. 787 (1920), 10 U. S. C. A. §1473 (1927).

[9] United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925).

[10] *Ex parte* Goldstein, 268 Fed. 431 (D. C. Mass. 1920).

[11] United States v. McIntyre, 4 F. (2d) 823 (C. C. A. 9th, 1925).

Neither the Selective Training and Service Act of 1940[12] nor the Service Extension Act of 1941[13] sets out the procedure for induction. Authority to prescribe the rules and regulations necessary to carry out the provisions of the act is delegated to the President. The regulations now in effect and in effect at the time the petitioner presented himself at the induction center merely provide, "At the induction center, the selected men found acceptable will be inducted into the land or naval forces."[14] There is no requirement for the giving of an oath.

There was, however, an earlier regulation,[15] to which the above is an amendment, that did provide that "An officer . . . will administer a prescribed oath to each of the men. He will then inform them that they are members of the land and [or] naval forces. . . ." This regulation was promulgated October 22, 1940. The amendment above was made December 31, 1941. Between these dates and under the authority of the first order, it was held that induction did include swearing allegiance,[16] but the petitioner's cause was heard more than nine months after the amendment was made.

This amendment, eliminating the requirement of an oath, said the court in the principal case, "undoubtedly was . . . to avoid question being raised and to avoid waste of army time and effort in resisting such improvident proceedings as the one here."[17*] However, there is a dictum to the effect that the court would be of the same opinion even if the earlier regulation were still in effect. The giving of an oath, it was said, is a mere formality. It is only required by statute to be given to voluntary enlistees.[18]

After the induction process was completed in the last war, the inductee became subject to the jurisdiction of the court martial even though his application for exemption had been improperly denied and his induction was therefore unlawful.[19] The present act provides that: "No person shall be tried by any . . . court martial . . . unless such person has been actually inducted. . . ."[20] Here lawful induction is no more a prerequisite to military jurisdiction than under the earlier act. Thus, there is no reason to suspect that the holding on this point will now be any different. Though he is not subject to military law till inducted, the registrant, and also non-registrant, is considered to have complete

[12] 54 STAT. 885 (1940), 50 U. S. C. A. Appendix, §301 *et seq.* (Supp. 1942).
[13] *Id.* §351 *et seq.*
[14] SELECTIVE SERVICE REGULATIONS (2d Ed. 1941) ¶633.9.
[15] 4 SELECTIVE SERVICE REGULATIONS §429 (1940).
[16] Stone v. Christensen, 36 F. Supp. 739 (D. C. Ore. 1940).
[17*] The writer does not necessarily agree with the court's criticism of the petitioner and feels that such criticism could well be omitted from the opinion.
[18] Article of War 109, 41 STAT. 809 (1920), 10 U. S. C. A. §1581 (1927).
[19] *Ex parte* Tinkoff, 254 Fed. 912 (D. C. Mass. 1919).
[20] Selective Training and Service Act §11 (1940), 54 STAT. 849 (1940), 50 U. S. C. A. Appendix, §311 (Supp. 1942).

knowledge of the act and of the regulations made pursuant to it,[21] and the mailing to the registrant of any communication concerned with the act constitutes notice of the contents whether or not it is ever actually received.[22] Ignorance of the law, no matter for what reason, is no excuse.[23]

After the draft board mails the registrant his notice of classification, he has five days to request an opportunity to appear before the board in person.[24] If he does not speak English, he may appear with an interpreter, but he cannot be represented by an attorney.[25] The purpose of this is probably to avoid prejudice to those unable to pay attorney's fees. From the decision of the local board, the registrant may appeal to the State Board of Appeal.[26] At that hearing the registrant has no right to appear. The decision is based wholly on the record sent up from the local board. Finally, the appeal may lie to the President in certain specified cases.[27]

On receipt of new evidence the local board may reclassify the registrant at any time before induction,[28] and the same appellate procedure lies from a reclassification as lies from the original classification.[29]

In order to minimize any hardships and injustices caused by this procedure, Government Appeal Agents[30] and Advisory Boards have been established.[31] There is an Appeal Agent for each local board. His duties are twofold: (1) to give registrants legal advice concerning appeal and (2) to protect the interests of the government by appealing any classification he thinks should be appealed. Advisory Boards, appointed by the governor of each state, have the sole function of aiding the registrant in preparing his questionnaires, claims, etc. However, the functions of these agencies are unfortunately inadequate because of the general lack of knowledge of their existence.

Even though this procedure permits a fair hearing and the decision of the local board is expressly made final except where appeal is authorized by the regulations,[32] the courts will grant review after exhaustion of the remedies provided in the act[33] in those cases where the board

[21] 1 SELECTIVE SERVICE REGULATIONS §155 (1940).
[22] *Id.* §158.
[23] Lekto v. Scott, 251 Fed. 767 (E. D. N. Y. 1918) (petitioner had inadequate knowledge of English).
[24] 3 SELECTIVE SERVICE REGULATIONS §368 (1940).
[25] *Id.* §368.
[26] *Id.* §§370-378.
[27] *Id.* §§379-381.
[28] *Id.* §387.
[29] *Id.* §388.
[30] 1 SELECTIVE SERVICE REGULATIONS §135 (1940).
[31] *Id.* §145.
[32] Selective Training and Service Act §10 (1940), 54 STAT. 893 (1940), 50 U. S. C. A. Appendix, §310 (Supp. 1942).
[33] Johnson v. United States, 126 F. (2d) 242 (C. C. A. 8th, 1942); United States v. Kowal, 45 F. Supp. 301 (D. C. Del. 1942). Same applied under 1917 act. Napore v. Rowe, 256 Fed. 832 (C. C. A. 9th, 1919). It was further held under that act that after exhaustion of the remedies, resort to the courts must be prompt.

acted arbitrarily,[34] where it had no jurisdiction[35] or where there was no evidence to support the finding of the board.[36*] Also, where a defendant is charged with violation of the Selective Service Act by failing to comply with the orders of the local board, he may defend on the same grounds.[37] However, in the last war, it was difficult to prove any of the prerequisites to judicial protection,[38] and there is no reason to believe that it will be easier now.[39]

Review by certiorari is not permitted because the functions of the draft boards are legislative and administrative and not judicial.[40] Injunction will not lie[41] because the petitioner is claiming a violation of merely personal rights and because equity will not interfere to control the action of public officials constituting inferior quasi judicial tribunals on matters within their jurisdiction. Therefore, it appears that the only course open to the aggrieved registrant is to wait until he is inducted and then sue out a writ of habeas corpus and attempt to convince the court that the board denied him a fair hearing.

The constitutionality of legislation calling for compulsory military service in time of war has many times been questioned and always sustained,[42] but the Selective Training and Service Act of 1940 is the first peace time compulsory service bill in the history of our nation. This fact has furnished new fuel for attacks on the ground of unconstitutionality. It is not doubted that Congress has the power to raise and support armies

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Two months was too long to delay. *Ex parte* Blazekovic, 248 Fed. 327 (E. D. Mich. 1918).

[34] United States v. Grieme, 128 F. (2d) 811 (C. C. A. 3d, 1942); *ex parte* Hurtflis, 245 Fed. 413 (E. D. N. Y. 1918).

[35] United States v. Newman, 44 F. Supp. 817 (E. D. Ill. 1942); United States *ex rel.* Bartalini v. Mitchell, 248 Fed. 997 (E. D. N. Y. 1918).

[36*] Application of Greenberg, 39 F. Supp. 13 (D. C. N. J. 1941); *ex parte* Platt, 253 Fed. 798 (W. D. N. Y. 1917). If there is any evidence at all to support the board, the court is without jurisdiction to review. United States v. Buttecali, 46 F. Supp. 39 (S. D. Tex. 1942).

It has been said that the court has no jurisdiction at all to review the action of the local board because it is purely administrative and not quasi judicial. Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941). However, that case appears to have been based erroneously on an earlier decision that a writ of certiorari would not issue to review the classification of the board. United States *ex rel.* Roman v. Rauch, 253 Fed. 814, 816 (S. D. N. Y. 1918). The better view seems to be that the court may not substitute its own judgment for that of the draft board, but it may determine whether a fair hearing has been afforded. Micheli v. Paulin, 45 F. Supp. 687 (D. C. N. J. 1942).

[37] United States v. Newman, 44 F. Supp. 817 (E. D. Ill. 1942).

[38] *Ex parte* Kusweski, 251 Fed. 997 (N. D. N. Y. 1918).

[39] Filmio v. Powell, 38 F. Supp. 183 (D. N. J. 1941).

[40] Drumheller v. Berks County Local Board No. 1, 130 F. (2d) 610 (C. C. A. 3d, 1942). It was suggested under the 1917 act that certiorari would be appropriate. Angelus v. Sullivan, 246 Fed. 54, 68 (C. C. A. 2d, 1917). However, the courts refused to permit it. *Re* Kitzerow, 252 Fed. 865 (E. D. Wis. 1918).

[41] Angelus v. Sullivan, 246 Fed. 54, 64-66 (C. C. A. 2d, 1917); Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941).

[42] Selective Draft Cases, 245 U. S. 366, 38 S. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, ANN. CAS. 1918B 856 (1917).

in peace time,[43] but it has been argued that the power to compel service can only follow a declaration of war. Fortunately, this argument has not been successful.[44] The power given to Congress is plenary. There is no such limitation placed upon it. To so limit would preclude our preparing for battle, though we knew battle was to come, until it was too late. This thought is not new to our times. Alexander Hamilton writing in *The Federalist*[45] remarked that "the ceremony of a formal declaration of war has of late fallen into disuse." He then pointed out the mistake of waiting for an attack before issuing the legal warrant for protective measures.

It is only by the grace of the legislature that certain classes of citizens including conscientious objectors are exempt from service. Under the present act objectors receive more liberal treatment than under the 1917 Act in that they are not required to be members of a religious sect. However, their objections must be based on their "religious training and belief."[46] Thus, it still appears that no one without a religious belief may be exempt even though he may have the strongest moral convictions against combat. But, if one is entitled to an exemption, he does not have to prove it affirmatively before his local board as he did under the 1917 Act.[47] In fact, the present administrative tendency is to permit few exemptions to be waived, and those may only be waived in writing.[48] The requirement of military service, the "supreme and noble duty of citizenship,"[49] could, should Congress so desire, be exacted of every citizen without exception. In upholding the constitutionality of the Confederate Conscription Law, the Virginia court said: "The citizens have a right collectively and individually to the services of each other to avert any danger which may be menaced. The manner in which the service is to be apportioned among them and rendered by them, is a matter for the legislature. The government, as the agent and trustee of the people, is charged with the whole military strength of the nation, in order that it may be employed so as to ensure the safety of all."[50]

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[43] U. S. CONST. Art. I, §8, ¶12.

[44] United States v. Lambert, 123 F. (2d) 395 (C. C. A. 3d, 1941); United States v. Herling, 120 F. (2d) 236 (C. C. A. 2d, 1941).

[45] No. XXV (1787).

[46] Selective Service and Training Act §4(g) (1940), 54 STAT. 885 (1940), 50 U. S. C. A. Appendix, §301 *et seq.* (Supp. 1942).

[47] Napore v. Rowe, 256 Fed. 333 (C. C. A. 9th, 1919).

[48] Geraghty, *Judicial Protection of Individuals Under the Selective Training and Service Act of 1940* (1941) 36 ILL. L. REV. 310, 314, n. 34.

[49] Selective Draft Cases, 245 U. S. 366, 38 S. Ct. 159, 62 L. ed. 349, L. R. A. 1918C 361, ANN. CAS. 1918B 856 (1917).

[50] Burroughs v. Peyton, 16 Gratt. 470, 487 (Va. 1864).

Another of our Southern courts waxed poetic in holding that a soldier forced to serve was not a slave. It said, "Nations do not pension slaves to commemorate their valor. They do not 'give in charge their names to a sweet lyre'; nor does 'sculpture in her turn give bond in stone and ever during brass to guard and immortalize the trust.'" Story v. Perkins, 243 Fed. 997, 998-999 (S. D. Ga. 1917).